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In the Supreme Court of the United States

OCTOBER TERM, 1992

MUSICK, PEELER & GARRETT, ET AL., PETITIONERS

v.

EMPLOYERS INSURANCE OF WAUSAU, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS PEAT MARWICK MAIN & CO. AND K.M.G. MAIN HURDMAN

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QUESTION PRESENTED

Whether contribution is available to allocate responsibility among defendants in a private damages action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).

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BRIEF FOR RESPONDENTS PEAT MARWICK MAIN & CO. AND K.M.G. MAIN HURDMAN

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 954 F.2d 575. The memorandum decision and order of the district court (Pet. App. 14-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1992, and a petition for rehearing was denied on May 28, 1992 (Pet. App. 32). The petition for a writ of certiorari was filed on July 2, 1992, and was granted on October 5, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The relevant portions of Section 11(f) of the Securities Act of 1933, 15 U.S.C. § 77k(f); Sections 9(e), 10(b), and 18 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78j(b), and 78r; and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, are set forth in the appendix to this brief.

STATEMENT

Respondents Peat Marwick Main & Co. and K.M.G. Main Hurdman (hereinafter "Peat Marwick") are in a somewhat unusual position in this case. Like petitioners, they are defendants in this contribution action and therefore would benefit in this case if the Court were to eliminate contribution with respect to liability under Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b). But, as an accounting firm that provides professional services to a wide range of public companies, Peat Marwick finds itself named as a defendant with some frequency in actions commenced under Section 10(b) after securities issued by one of its clients suffer a sudden decline in value. The claim in those cases—as here—is that financial statements audited by Peat Marwick contained material misstatements or omissions.

In that setting, Peat Marwick often confronts situations in which the complaint names as defendants other persons or entities (such as the issuer of the securities whose purchase or sale is the basis for the Section 10(b) claim, that company's officers and directors, or the company's attorneys and underwriters) that may bear all, or at least a significant amount, of the responsibility for the events underlying the claimed fraud. In order to ensure that it will not be forced to shoulder an unfair share of the responsibility for any settlement payment or damages award, Peat Marwick invokes the contribution right against such parties. Because Peat Marwick views con-

tribution as an essential element of the private action implied under Section 10(b), it submits this brief urging the Court to leave in place the well-settled principle that contribution is available to allocate responsibility in actions under Section 10(b).[1]

1. This case arises out of a class action filed in 1984 in the United States District Court for the Southern District of California by purchasers of securities issued by Cousins Home Furnishings, Inc. The plaintiffs alleged that documents issued in connection with a 1983 public offering of securities by Cousins contained false and misleading statements and that the price of the securities was artificially inflated by those statements and by certain other statements made by Cousins that allegedly were also false and misleading. The complaint asserted violations of Section 10(b) and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5; Section 11 of the Securities Act, 15 U.S.C. § 77k; and state law. Pet. App. 3.

Named as defendants in that action were Cousins, some of Cousins' officers and directors, Cousins' parent corporation, and Cousins' underwriters. The plaintiffs affirmatively decided not to join Cousins' accountants and attorneys. The named defendants eventually settled the case for $13.5 million. The district court approved the settlement, finding that it constituted "'the settling defendants' fair or proper share of the total damages sought by the plaintiffs.'" Pet. App. 3.

Respondents Employers Insurance of Wausau and Federal Insurance Co. were the insurers for the officers and directors who settled in the class action; the two com-

[1] In the court below, Peat Marwick limited its argument to the contention—accepted by the district court (see Pet. App. 18-24)—that contribution was not available to these plaintiffs on the facts of this case. Peat Marwick did not dispute the existence of a contribution right in Section 10(b) actions.

panies paid $13 million of the settlement. The insurers then instituted the present case as subrogees of the settling defendants, seeking contribution and indemnity for the settlement payment. They joined as defendants petitioners and respondent Peat Marwick, all of whom are attorneys or accountants, alleging that they provided professional services to Cousins in connection with the 1983 stock offering. The complaint seeks contribution under Section 10(b), Section 11, and state law. Pet. App. 4, 16-17.

2. The district court dismissed the complaint, holding that contribution was precluded by the prior determination that the settlement amount represented the settling defendants' "fair or proper share of the total damages." Because contribution is available only when a defendant pays more than its share of the liability, and the settling defendants paid only their "fair share" of the damages suffered by the plaintiffs, those defendants were not entitled to obtain contribution from other parties. Pet. App. 19-23.

The court of appeals reversed. It held that the "fair share" determination made in approving the settlement of the class action established that "the total amount of the settlement bore a reasonable relationship to the damage suffered by the plaintiff class, discounting for factors such as the cost and uncertainty involved in litigating the dispute" and that the "amount paid by each individual defendant was 'fair' given their culpability *relative to the other defendants involved in the litigation.*" Pet. App. 7-8 (emphasis in original). But the court found that the "fair share" determination did not address the fairness of the payments by the settling defendants relative to any *nonparties* allegedly responsible for the injury, and therefore provided no basis for dismissing the contribution claim against persons and entities not parties to the original action. *Id.* at 8-9. The court remanded the case for further proceedings on the contribution claim.

INTRODUCTION AND SUMMARY OF ARGUMENT

Contribution is a means of allocating responsibility among jointly liable defendants. "Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 87-88 (1981) (footnote omitted). A defendant who pays more than his share—whether in settlement or pursuant to a judgment on the merits—is entitled to recover the overpayment from other responsible parties. Contribution may provide the basis for a separate action to recover the overpayment, but it probably is most frequently invoked to apportion responsibility among parties in already-existing actions.

The right to allocate responsibility among jointly liable parties through contribution has long been a recognized element of the remedy implied under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). From the first reported decision addressing the question—a 1968 district court ruling upholding contribution—the district courts and courts of appeals were remarkably consistent in permitting contribution until 1988, when a few district courts began to conclude, on the basis of the then seven-year-old decisions in *Northwest Airlines*, *supra*, and *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), that contribution should no longer be allowed. That view was rejected by other district courts, however, and was not adopted by *any* court of appeals until earlier this year. *Chutich* v. *Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992). Contribution has thus been a well-settled—and extremely important—element of the Section 10(b) remedy for over two decades.

Petitioners' argument that contribution should be eliminated from the Section 10(b) action rests on their contention that this Court should define the contours

of the private action implied under Section 10(b) by utilizing the principles set forth in *Northwest Airlines* and *Texas Industries*. Those cases held—in the context of causes of action expressly created by Congress—that contribution is permissible only where specifically authorized by Congress. Because there is no evidence that Congress intended to authorize contribution among defendants held jointly liable under the Section 10(b) implied right of action, petitioners conclude that contribution should not be permitted.

Petitioners' approach is, of course, wholly inapposite in the peculiar context of Section 10(b). This Court has recognized that Section 10(b) was created by the courts, not by Congress. It therefore is "hardly surprising" (*Franklin* v. *Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1035 (1992)) that Congress said nothing about contribution when it wrote the statute. "[T]he usual recourse to statutory text and legislative history * * * necessarily will not enlighten [the Court's] analysis." *Ibid.*

The proper approach for determining the contours of the Section 10(b) remedy is the one that the Court utilized in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), to identify the appropriate statute of limitations for Section 10(b) actions. The Court looked to the limitations period that Congress adopted to govern the analogous express causes of action enacted with Section 10(b). The Court explained that it could "imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." *Id.* at 2780.

The causes of action that the Court looked to in *Lampf*—Sections 9 and 18 of the Securities Exchange Act, 15 U.S.C. §§ 78i & 78r—both expressly provide for contribution. Although Congress did not authorize contribution in some

other nonanalogous causes of action set forth in the securities laws, the provisions that most closely resemble Section 10(b) all provide for contribution. There can be no doubt that had Congress expressly authorized a private cause of action in Section 10(b), it would have authorized contribution as well.

Petitioners and their amicus argue that various policy considerations weigh against contribution. But Congress evaluated the relevant policies and determined that contribution should be permitted in causes of action closely resembling Section 10(b). Given that clear indication of congressional intent, there is no need for this Court to make an independent policy determination. In any event, considerations of fairness and deterrence, and the need to prevent "strike suits," all support continued recognition of contribution in Section 10(b) actions.

Finally, petitioners contend that the Court may not allow contribution even if it is certain that Congress would have authorized contribution had it known that a private damages action would be implied under Section 10(b). Nothing in this Court's jurisprudence requires that absurd result.

Petitioners' contention is based on the supposed difference between the "task of fleshing out the contours of the [Section 10(b)] claim" (Pet. Br. 16) and recognition of what they assert to be the wholly separate contribution right. But a claim in contribution is not independent of the plaintiff's Section 10(b) action; it is entirely dependent upon and subsidiary to the plaintiff's claim. And contribution does not expand the courts' authority, because contribution may be asserted only against parties who could have been joined as defendants in the first place. There simply is no basis for petitioners' distinction between the contribution issue and the other questions regarding the parameters of the Section 10(b) remedy that have been resolved by this Court.

Even if the question whether to allow contribution were analyzed under the principles the Court uses to decide whether to recognize a wholly independent cause of action, the outcome would not change. Given the longstanding judicial recognition of contribution and Congress's ratification of that settled rule, the contribution right can be upheld on the same basis as the Section 10(b) action itself.

In addition, in the particular circumstances presented here, recourse to federal common law is permissible to allow the Court to complete the judicially created Section 10(b) remedy in a manner that comports with congressional intent. There simply is no reason that the Court should be forced to overturn a settled rule of more than two decades' duration when that result would produce a remedy directly at odds with Congress's design and with fundamental fairness.

ARGUMENT

CONTRIBUTION SHOULD BE PERMITTED AMONG DEFENDANTS IN ACTIONS UNDER SECTION 10(b)

The question presented in the certiorari petition regarding the availability of contribution in private actions under Section 10(b) encompasses two issues. The first issue is whether under the approach this Court has applied in determining the configuration of the Section 10(b) remedy—which looks to what Congress would have done had it known it was creating a private damages remedy—Section 10(b) is appropriately construed to permit defendants to allocate responsibility among themselves through contribution claims. The second issue is whether, assuming Section 10(b) is appropriately construed to authorize contribution, recognition of a contribution right is nonetheless beyond the authority of this Court. Petitioners improperly conflate these inquiries, and in the process completely ignore the methodology that this Court repeatedly has utilized in resolving questions

regarding the Section 10(b) remedy. We address each of these issues in turn.

A. Contribution Is Appropriate In Section 10(b) Actions Because Congress Would Have Expressly Authorized Contribution If It Had Known It Was Creating A Private Damages Action When It Enacted Section 10(b).

Where a cause of action is created by Congress, this Court resolves questions regarding the contours of that cause of action by looking to what Congress intended. See, *e.g.*, *Holmes* v. *Securities Investors Protection Corp.*, 112 S. Ct. 1311, 1317-1318 (1992) (standing to sue under RICO); *Pinter* v. *Dahl*, 486 U.S. 622, 641-654 (1988) (class of defendants subject to liability under Section 12 of Securities Act); *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 152 (1987) (statute of limitations under RICO). The Court has utilized the same approach in answering questions regarding the availability of contribution in express causes of action; they too are decided on the basis of Congress's intent. *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639-640 (1981) (contribution under antitrust laws); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 90-95 (1981) (contribution under Equal Pay Act and Title VII).

Petitioners argue (Br. 19-24) that the same approach should apply to the question presented in this case. Finding no evidence that Congress intended to authorize contribution claims, they conclude that contribution should not be permitted in Section 10(b) actions.

Petitioners' syllogism is entirely inapposite here. This Court "ha[s] made no pretense that it was Congress' design to provide the [private damages] remedy afforded" under Section 10(b). *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991). It is therefore "no surprise" (*ibid.*) that Congress did not indicate its view regarding any of the innumerable ques-

tions that must be resolved in order to fix the contours of the cause of action—including, for example, the types of injuries that give rise to a claim for damages; the existence of defenses based upon the fault or misconduct of the plaintiff; the measure of damages; the statute of limitations; and the allocation of damages, such as whether defendants' liability is several or joint and several and, if joint and several, whether contribution among jointly liable defendants is available. Cf. *Franklin* v. *Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1035 (1992) (where the statute "supported no express right of action," and the cause of action was instead judicially created, "it is hardly surprising that Congress also said nothing about the applicable remedies"). The absence of any evidence of congressional intent with respect to these issues is due to the fact that Congress had no reason to consider any of these questions because it did not intend to create a private damages remedy in the first place.

Petitioners "fundamentally misunderstand the nature of the inquiry, therefore, by needlessly dedicating large portions of their brief[] to discussions of how the text and legislative intent behind [Section 10(b)] are 'silent' on" the question of contribution. *Franklin*, 112 S. Ct. at 1035. "Because the cause of action was inferred by the Court * * *, the usual recourse to statutory text and legislative history * * * necessarily will not enlighten [the Court's] analysis." *Ibid.* This Court recognized as much in *Lampf*, observing that it was "faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed." 111 S. Ct. at 2780.[2]

[2] In *Northwest Airlines* and *Texas Industries*, the Court also acknowledged the distinction between congressionally created causes of action and judicially implied ones. It expressly reserved the question whether the standard announced in those cases for determining the availability of contribution in causes of action created by Congress would apply to Section 10(b), observing that the Section 10(b) cause of action was not created by Congress. *Texas Indus.*, 451 U.S. at 640 n.11; *Northwest Airlines*, 451 U.S. at 91-92 n.24. It is remarkable that petitioners rely on these decisions without ever acknowledging the Court's express recognition that a different result might be appropriate for actions under Section 10(b).

Rather than apply a meaningless test, the Court has construed judicially created actions by looking to what Congress would have done had it known that it was creating a private right of action. This approach has the virtue of anchoring these actions as much as possible in congressional determinations, thereby limiting the need for independent policymaking by the Court. Thus, in deciding on the limitations period applicable to Section 10(b) actions, the Court adopted the limitations period that governed analogous causes of action in the same statute. *Lampf*, 111 S. Ct. at 2780. The Court reasoned that it could "imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." *Ibid.*

Similarly, in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975), the Court held that only actual purchasers or sellers of securities could assert damages claims under Section 10(b) because the express causes of action "created by Congress contemporaneously with the passage of § 10(b)" were limited to purchasers and sellers. The Court reasoned that "[i]t would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." *Ibid.*

The inquiry in this case should be the same. To determine whether contribution is available under Section 10(b), the Court should consider how Congress treated contribution in "similar and related" provisions of the securities laws. Under that standard, there can be no

doubt that Section 10(b) should be construed to permit contribution.[3]

1. *Congress Provided For Contribution In The Express Causes Of Action That Are Most Analogous To The Section 10(b) Action.*

This Court already has identified the express causes of action most analogous to the action implied under Section 10(b). In selecting the appropriate statute of limitations for Section 10(b) actions, the Court in *Lampf* looked to Section 9 of the Securities Exchange Act, 15 U.S.C. § 78i, which provides a cause of action for manipulative marketing of securities, and Section 18 of that statute, 15 U.S.C. § 78r, which allows a purchaser of securities to recover for reliance on false and misleading statements in documents filed with the Securities and Exchange Commission. See 111 S. Ct. at 2781. These

[3] Petitioners suggest (Br. 14-15) that the Court somehow has less authority to construe the Section 10(b) remedy in a manner favorable to *defendants*. There is no support whatever for that contention. In *Lampf*, the Court held that plaintiffs' claims were governed by a strict limitations period; under petitioners' approach, the Court should have adopted no limitations period at all. See also *Blue Chip Stamps*, *supra* (restricting class of injured parties entitled to damages under Section 10(b)).

Petitioners also contend (Br. 24) that Congress in 1934 may have "anticipated the implication of a remedy for victims of violations of § 10(b) and permitted judicial development of that remedy in conscious reliance on the rule that contribution was not available." They cite no support for this theory, which is wholly inconsistent with this Court's observation that Congress did not contemplate a private damages action under Section 10(b). Moreover, if petitioners are correct, *Lampf* was wrongly decided: Congress would also have acted "in conscious reliance" on the general rule that, in the absence of an express federal limitations period, courts will apply state statutes of limitation to federal actions. See *Campbell* v. *Haverhill*, 155 U.S. 610, 617 (1895). Of course, *Lampf* rejected that approach, expressly holding that the proper way to ascertain Congress's intent with respect to the contours of the Section 10(b) action is to look to analogous provisions of the federal securities laws.

provisions, the Court reasoned, "target the precise dangers that are the focus of § 10(b)," and, like Section 10(b), each "was intended to facilitate a central goal: 'to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges.'" *Ibid.* (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195 (1976)).

Section 9 and Section 18 both expressly provide for contribution. See 15 U.S.C. §§ 78i(e) and 78r(b). The reasoning applied by the Court in *Lampf* compels the conclusion that Congress would have permitted contribution in actions under Section 10(b) as well.

The conclusion that Congress would have authorized contribution in Section 10(b) actions rests on more than this Court's determination in *Lampf*, however. Comparing Section 10(b) with these express causes of action, and with Section 11 of the Securities Act, 15 U.S.C. § 77k, which imposes joint and several liability for false statements in a registration statement filed with the Commission and also provides for contribution (*id.* § 77k(f)), reveals a number of close similarities that provide an even greater justification for the inference that Congress would have authorized contribution under Section 10(b).[4]

[4] Petitioners point out (Br. 26) that contribution is not available to all defendants under Section 11: the provision does not allow a party that acted with scienter to obtain contribution from a party that did not. See 15 U.S.C. § 77k(f). A party that acted with scienter may, however, obtain contribution from another party that acted with scienter. *Ibid.* That is all that is relevant here, because proof of scienter is required to impose liability under Section 10(b). Thus, the Section 11 contribution provision would not limit the contribution rights of the class of persons who may be liable under Section 10(b). Sections 9 and 18—both of which require a plaintiff to show that the defendant was guilty of something more than mere negligence—place no limit on defendants' ability to seek contribution. See 15 U.S.C. §§ 78i(e) and 78r(b).

First, Section 9 is the express-cause-of-action provision that comes closest to the broad reach of Section 10(b). Indeed, even the language used by Congress in the two sections is similar. Compare 15 U.S.C. § 78i (prohibiting a variety of "manipulat[ive]" practices) with *id.* § 78j(b) (barring the use of "any manipulative or deceptive device or contrivance" in violation of rules adopted by the SEC). This similarity in coverage provides strong support for applying the contribution rule set forth in Section 9.[5]

Second, all three of these express causes of action resemble Section 10(b) in that each subjects a wide variety of individuals to liability. Thus, liability under these sections extends to "[a]ny person who willfully participates" in the manipulation of security prices (15 U.S.C. § 78i(e)); "[a]ny person who shall make or cause to be made" a false or misleading statement in a filing (15 U.S.C. § 78r); and any person who signed a false registration statement, was (or was named in the statement as) a director of or partner in the issuer, or has with his consent been named as having prepared or certified any part of the registration statement or a related report or valuation, such as an accountant, engineer, or appraiser (15 U.S.C. § 77k(a)). Section 10(b), of course, imposes liability on "any person" who violates the broad prohibitions set forth in that provision.

Third, the three express causes of action are the only provisions "under which Congress envisaged joint liability by multiple defendants." Note, *Contribution Under the Federal Securities Laws*, 1975 Wash. U. L.Q. 1256, 1258. Accord 3 L. Loss, *Securities Regulation* 1739-1740 n.178 (2d ed. 1961). Joint liability is commonplace under Section 10(b).

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[5] This Court indicated in *Lampf* that the cause of action created in Section 9 is the one most analogous to the Section 10(b) action. 111 S. Ct. at 2782 n.9.

It is clear from these "similar and related" provisions, then, that Congress would also have provided for contribution under Section 10(b) if it had known that it was creating a private right of action under that section. Given Congress's decision to authorize contribution in the express causes of action, and the close "fit" between those provisions and Section 10(b), the inference regarding congressional intent is compelling. Cf. *Lampf*, 111 S. Ct. at 2780.

2. *The Express Causes Of Action Cited By Petitioners Are Not Analogous To The Section 10(b) Action.*

Petitioners contend that Congress's intent regarding contribution cannot be discerned from these three express causes of action because other express-cause-of-action provisions of the securities laws do not authorize contribution. This fact, petitioners argue, shows that "Congress had no general intention to grant contribution rights to joint wrongdoers" under the securities laws. Pet. Br. 25. The provisions cited by petitioners, however, differ significantly from Section 10(b). Thus, while Congress did not determine that contribution was appropriate for every cause of action created in the federal securities laws, it clearly did determine that contribution was appropriate for all causes of action with the characteristics of the action implied under Section 10(b). There can be no doubt that Congress would have reached the same conclusion with respect to Section 10(b).

a. *Section 16.* Section 16 of the Securities Exchange Act, 15 U.S.C. § 78p(b), provides for disgorgement of profits made by corporate insiders on "short-swing" transactions in company stock. In *Lampf*, the Court specifically rejected Section 16 as a basis for inferring congressional intent with respect to Section 10(b) because of the significant differences between the two sections. Section 16, the Court reasoned, "requires the disgorgement of unlawful profits and differs in focus

from § 10(b) and from the other express causes of action." 111 S. Ct. at 2780 n.5.

Section 16 provides an especially inapt analogy with respect to the contribution question because contribution would make no sense where a defendant is required to disgorge the profits that *he himself* obtained through unlawful activity. See 15 U.S.C. § 78p(b) (requiring disgorgement by owner, director, or officer of "any profit realized *by him* from any purchase and sale, or any sale and purchase, of any equity security of such issuer * * * within any period of less than six months") (emphasis added). Contribution comes into play only where a defendant is jointly and severally liable for harm caused by himself and others and pays more than his fair share. See page 5, *supra*; Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 Duke L.J. 543, 551. Because liability under Section 16(b) is by definition limited to the particular defendant's own "share"—the "profit realized by him"—contribution simply is not needed to effect a fair allocation of responsibility.[6]

In view of the nature of the Section 16 remedy, then, the absence of a contribution right in that section is to

[6] Petitioners cite *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418 (1972), for the proposition that "Section 16 may trigger multiple liability of co-owners of the security traded, and a short swing seller may be an entity with numerous control persons." Br. 27. In fact, *Reliance Electric*—which involved only one owner alleged to have made an unlawful short swing profit—says nothing about multiple liability or entities with more than one control person. In any event, the possibility that more than one co-owner (or more than one control person of a single corporate owner) may be *individually* liable under Section 16(b), each for his own unlawful profits, does not refute the point that contribution makes no sense where disgorgement, as opposed to damages, is the remedy. Nor does it change the fact that the *language* of Section 16 plainly contemplates individual, rather than joint and several, liability.

be expected. Because the Section 10(b) action does not share the relevant characteristics of the Section 16 action, the absence of contribution from Section 16 reveals nothing about what Congress would have intended with regard to Section 10(b).

b. *Section 12.* Petitioners also rely upon Section 12 of the Securities Act of 1933, 15 U.S.C. § 77*l*, which imposes liability on any person who offers or sells an unregistered security or offers or sells a security by means of a false prospectus or oral communication. That provision differs in several important respects from Section 10(b) and therefore does not provide an appropriate source for deriving a contribution rule for Section 10(b) actions.

To begin with, the focus of Section 12 is narrower than that of Section 10(b). The former applies only to false statements made by sellers of securities. Section 10(b), of course, applies to a much wider variety of fraudulent conduct.

In addition, the class of potential defendants under Section 12 is limited to a person who passes title to a security or who "successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Pinter* v. *Dahl*, 486 U.S. 622, 647 (1988). This Court specifically rejected a test that would have imposed liability on all persons whose actions were a "substantial factor" in causing a securities transaction to take place because such an approach "would extend * * * liability to participants only remotely related to the relevant aspects of the sales transaction. Indeed, it might expose securities professionals, such as accountants and lawyers, whose involvement is only the performance of their professional services, to * * * strict liability for rescission." *Id.* at 651.[7]

[7] Although *Pinter* addressed only the scope of liability under Section 12(1), the courts have uniformly held that its reasoning

As a consequence of this legal standard, the number of persons liable under Section 12 in any one case is likely to be quite small. In many situations, there will be only one defendant—the actual owner of the securities. See Loewenstein, *supra* at 551 ("Congress probably assumed that only one person could be liable for a violation of [Sections 12(1) and 12(2)] since the language of those sections imposes liability on any person who sells a security in violation of the sections 'to the person purchasing such security from *him*'"). Section 10(b) and the express causes of action, by contrast, typically reach multiple defendants in every single case.

Moreover, Section 12 liability is limited to persons intimately involved in the consummation of the sales transaction. This Court's construction of the provision in *Pinter* expressly precludes its application to the wide variety of actors—accountants, lawyers, and the like—who may be reached under Section 10(b) and the express causes of action.

The limitation of liability under Section 12 to a single or, at most, a small group of wrongdoers at the center of an unlawful transaction sharply distinguishes the provision from Section 10(b) and from the express causes of action that do provide for contribution. One important consideration in determining whether contribution is appropriate as a matter of policy is whether the broad reach of a provision will result in the imposition of all of the liability on a party who had only a tangential role in the wrong. See pages 22-26, *infra*. Because Section 12 liability is limited to a few parties, and only those parties who play a central role in a securities transaction,

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applies with equal force to Section 12(2), which also refers to "[a]ny person who * * * offers or sells a security." 15 U.S.C. § 77*l*(2). See, *e.g.*, *Moore* v. *Kayport Package Express, Inc.*, 885 F.2d 531, 535 (9th Cir. 1989); *Wilson* v. *Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1126 (2d Cir. 1989); *In re Craftmatic Sec. Litig.*, 890 F.2d 628, 635-636 (3d Cir. 1989). See also *Pinter*, 486 U.S. at 642 n.20.

the need for contribution is much less compelling than it is when liability is imposed on a variety of persons with disparate levels of involvement in the wrongdoing. The broad reach of Sections 9 and 18 of the Securities Exchange Act and Section 11 of the Securities Act explains why Congress concluded that contribution was proper with respect to those provisions, and why it would have done the same with regard to Section 10(b).[8]

c. *Sections 15 and 20.* Finally, petitioners point to Section 15 of the Securities Act, 15 U.S.C. § 77*o*, and Section 20 of the Securities Exchange Act, 15 U.S.C. § 78t, which impose civil liability on persons who "control" other persons found liable under the substantive provisions of the Acts. These provisions do not create causes of action, however. They simply subject an additional class of persons to liability under the causes of action created elsewhere in the securities laws.

There would have been no reason for Congress to include an authorization of contribution in a provision that does not create a cause of action. Contribution may be obtained by, and against, controlling persons if it is authorized under the cause of action that is the basis for the suit. See *Laventhol, Krekstein, Horwath & Horwath* v. *Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980), cert. denied, 452 U.S. 963 (1981) (controlling persons were liable for contribution despite Section 15's silence on contribution because the underlying liability provision, Section 11, provides for contribution). These provisions therefore provide no evidence of Congess's intent regarding the availability of contribution.[9]

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[8] It also is significant that Section 12—in contrast to Sections 9 and 18 of the Securities Exchange Act, Section 11 of the Securities Act, and the Section 10(b) action—provides for a rescissionary measure of relief in all cases. See *Pinter*, 486 U.S. at 641-642 nn. 18 & 20; *Randall* v. *Loftsgaarden*, 478 U.S. 647, 655-656 (1986).

[9] Petitioners also invoke (Br. 27) Section 20A of the Securities Exchange Act, 15 U.S.C. § 78t-1, as evidence that Congress would

In sum, Congress expressly provided for contribution when it created the causes of action most analogous to the one implied under Section 10(b). Under the analysis used by the Court in *Lampf*, it is clear that Congress would have provided for contribution under Section 10(b) if it knew that there would be a private damages action under that section.

Indeed, failure to recognize a right to contribution under Section 10(b) would disrupt Congress's plan. By providing for contribution under Sections 9 and 18 of the Securities Exchange Act and Section 11 of the Securities Act, Congress made clear that plaintiffs should not be given the option of imposing all of the liability on only one party. If contribution were unavailable under Section 10(b), a plaintiff could achieve precisely that result by asserting his claim solely under Section 10(b). Cf. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 210 (refusing to extend Section 10(b) actions to negligent wrongdoing because doing so would allow plaintiffs to avoid procedural restrictions on negligence actions provided by other sections). Acceptance of petitioners' submission would thus effectively overturn Congress's policy judgment. This Court should not countenance that result.[10]

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not have intended to provide contribution under Section 10(b). The Court in *Lampf*, however, specifically rejected Section 20A as a source for deriving a rule for Section 10(b) because Section 20A was added to the Securities Exchange Act in 1988, "more than 50 years after the original securities statutes, [and] focuses upon a specific problem, namely * * * 'insider trading.'" 111 S. Ct. at 2781. Moreover, the Court noted that Section 20A itself indicates that Congress did not intend to extend that Section's provisions to other sections of the Securities Exchange Act. *Ibid.* See 15 U.S.C. § 78t-1(d) ("[n]othing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter").

[10] Petitioners observe (Br. 21-22) that two courts of appeals have declined to apply to the Section 10(b) action the provision of some of the express causes of action authorizing the courts to condition

3. *Petitioners Have Presented No Reason To Reject Congress's Policy Judgment That Contribution Furthers The Purposes Of The Securities Laws.*

Petitioners and amicus National Association of Securities and Commercial Law Attorneys ("NASCAT") also contend that permitting contribution under Section 10(b) is bad policy. Specifically, they argue that contribution lessens the deterrent effect of the securities laws, discourages settlements, and imposes an unjustified burden on plaintiffs and courts. Pet. Br. 37-41; NASCAT Br. 15-29.

The principal flaw in these contentions is that Congress specifically found to the contrary. By providing for contribution in Sections 9 and 18 of the Securities Exchange Act and Section 11 of the Securities Act, Congress clearly determined that contribution furthers the goals of the securities laws. As we have discussed, Congress's policy judgment with respect to these provisions is equally applicable to Section 10(b). That legislative judgment, and not petitioners' or NASCAT's arguments to the contrary, should control the disposition of this case. In any event, there is ample support for Congress's determination that the relevant policy considerations weigh heavily in favor of contribution.[11]

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the prosecution of a private damages action upon the posting of security for any costs that might subsequently be awarded against the plaintiff. Those lower court rulings—which substantially predated *Lampf* and *Blue Chip Stamps*—obviously provide no basis for abandoning the methodology for configuring the Section 10(b) action applied by this Court in the latter decisions. That methodology plainly establishes that Congress would have permitted contribution in actions under Section 10(b).

[11] In the absence of clear evidence of what Congress would have intended, the Court has looked to policy considerations in order to resolve questions regarding the contours of the Section 10(b) action. *Blue Chip Stamps*, 421 U.S. at 737. Cf. *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2764 (1991). That course is not nec-

a. *Contribution Promotes Fairness By Ensuring That Primary Wrongdoers Do Not Escape Liability.*

"'There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.'" *Heizer Corp.* v. *Ross*, 601 F.2d 330, 333 (7th Cir. 1979) (citation omitted). See also *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 558-559 (5th Cir. 1981), aff'd in part, rev'd in part on other grounds, 459 U.S. 375 (1983) (failing to permit contribution leads to inequitable results); Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 541 (1981) ("it is irrational to compel one or more defendants, who may not have been the primary instigators of the fraudulent scheme, to bear the entire loss, while allowing other more culpable wrongdoers to escape liability completely").

Indeed, this Court has recognized as much in the admiralty context. *Edmonds* v. *Compagnie Generale Transatlantique*, 442 U.S. 256, 271-272 n.30 (1979) (contribution "remedies the unjust enrichment of the concurrent tortfeasor"); *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974) ("a 'more equal distribu-

essary here, because, as we have discussed, Congress plainly would have included a contribution right in Section 10(b).

Amicus NASCAT asserts (Br. 12-13) that this Court's decision in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977), precludes recognition of a contribution right. But the Court in *Santa Fe* simply "adhere[d] to the position that 'Congress by § 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement.'" *Id.* at 479 (citation omitted). Here, Congress plainly determined that contribution is a necessary element of the express claims most analogous to Section 10(b) and the relevant policy considerations support that determination. Because recognition of the contribution right is thus entirely consistent with congressional intent and with the applicable policies, *Santa Fe* supports the authorization of contribution here.

tion of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame") (citation omitted). The same conclusion applies with respect to Section 10(b).

The contrary position of petitioners and NASCAT is based on a fundamentally incorrect premise: that all defendants (or potential defendants) in securities cases are equally culpable. The reality in most securities litigation, however, is that a core of "insider" defendants is primarily responsible for making a material misrepresentation or devising and implementing a fraudulent scheme, typically in order to reap a financial gain from the victims of the fraud. The remaining defendants—such as outside directors, underwriters, lawyers, and accountants—are responsible only for failing to uncover the fraud. Moreover, such defendants stand to gain nothing but their fees for services rendered.[12]

The need for contribution is especially acute in these circumstances. It would be extremely unjust if a party held liable for failing to detect fraud were required to pay all of the plaintiff's damages, while the party who planned and executed the fraudulent scheme—and stood to gain financially from its success—escaped all liability. Contribution prevents such injustice by ensuring that the more culpable parties are required to pay for their wrongdoing.

b. *A No-Contribution Rule Would Encourage "Strike Suits."*

Elimination of the contribution right would encourage meritless securities litigation. A plaintiff could isolate a

[12] In this respect, securities litigation differs greatly from antitrust suits, in which the nature of the wrong committed by co-conspirators—and the type of potential benefit they stand to gain—is more roughly equivalent.

single "deep-pocket" entity—such as an auditor, lawyer, underwriter, or outside director—by naming only that party as a defendant in the Section 10(b) action, using settlements with more culpable defendants to isolate such a defendant, or threatening to enforce a judgment against only that defendant. Because such a defendant would face exposure for the plaintiff's entire loss, the pressure to settle would be great. Even where the defendant was entirely innocent, and the risk of losing was small, the defendant might well choose to settle rather than incur large attorneys' fees and face a potential loss of hundreds of millions of dollars.

In every case, therefore, innocent parties could be subjected to significant pressure to settle because of the threat of exorbitant liability and fees. As the Fifth Circuit has observed, "[t]he disallowance of contribution * * * encourages the presentation of enormous claims against numerous defendants in the hope that at least some of those named will, merely to avoid the heavy cost of litigation, pay a settlement amount rather than defend the action." *Huddleston*, 640 F.2d at 558. See also *River Garden Farms, Inc.* v. *Superior Court*, 103 Cal. Rptr. 498, 503 (Cal. Ct. App. 1972) ("[i]n a multi-party case the threat of an unshared judgment against the last remaining defendant—diminished only by meager settlements with his eager fellows—permits a plaintiff to create acute financial pressures bordering on extortion").

c. *Contribution Enhances The Deterrent Effect Of Section 10(b) Actions.*

Contribution increases deterrence by reducing the possibility that a participant in securities fraud will escape liability completely. *Laventhol, Krekstein, Horwath & Horwath*, 637 F.2d at 675. Accord *Tucker* v. *Arthur Anderson & Co.*, 646 F.2d 721, 727 n.7 (2d Cir. 1981); *Heizer Corp.*, 601 F.2d at 332; *Huddleston*, 640 F.2d at 558; 5D A. Jacobs, *Litigation & Practice Under Rule 10b-5* § 264.02[c], at 11-442 to 11-443 (2d ed. 1992)

("deterrence favors granting contribution. Contribution tends to increase the diligence of potential defendants because each of them knows that he will be responsible for a portion of the damages, whether or not the defrauded investor names him in the lawsuit").

This Court has long recognized contribution's added deterrent effect in the admiralty context: "A rule that divides damages by degree of fault would seem better designed to induce care * * * because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 405 n.11 (1975). See also *Cooper Stevedoring Co.*, 417 U.S. at 111 (noting that where two parties are at fault, contribution serves "[t]he interests of safety" by making both "'more careful'") (quoting *The Alabama*, 92 U.S. 695, 697 (1876)).

Petitioners contend that contribution lessens deterrence by allowing defendants to spread the cost of liability, and that risk-averse managers will be more deterred by the prospects of "catastrophic loss" that would result from liability for the entire amount of damages. Pet. Br. 40. See also NASCAT Br. 16-17. That assertion is contradicted by petitioners' own statement that persons who violate Section 10(b) "may be completely unfamiliar with contribution" and that, even if they knew it existed, their conduct would not be affected by contribution because its benefits are too uncertain. Pet. Br. 37-38. Petitioners thus concede that contribution cannot adversely affect deterrence.

Furthermore, in the securities context at least, the strong prospect of liability for some proportion of the damages is a greater deterrent than the slight prospect of liability for all the damages. In the absence of contribution, the person who devises and executes a fraudulent scheme may be undeterred because a "deep pocket"

law firm or accountant that fails to uncover his scheme will make a more inviting target for plaintiffs, allowing the perpetrator of the fraud to get off scot-free (or at the small price of a pre-trial settlement). In these circumstances, "[r]efusal of relief to those less blameworthy would frustrate the purpose of the securities laws; it would not serve to discourage the actions of those most responsible for organizing forbidden schemes; and it would sacrifice protection of the general investing public in pursuit of individual punishment." *Pinter* v. *Dahl*, 486 U.S. at 636 (allowing defendants to assert the *in pari delicto* defense under Section 12 only where the plaintiff is at least as blameworthy as the defendant). See also Adamski, *supra*, at 541 ("[o]n balance it seems that the court's allowance of contribution, which thus provides a more probable threat of liability even though for only a portion of total damages, better serves the deterrent purposes of the securities laws than would * * * a rule prohibiting contribution").

At the same time, a contribution regime supplies more than enough deterrence for parties such as auditors, lawyers, outside directors, and underwriters. The benefit to such parties from securities fraud typically is claimed to be the continued receipt of fees from the issuer. But a proportionate share of the damages will in every case exceed many times over any conceivable gain from securities fraud. The threat of liability will therefore provide a sufficient deterrent to wrongdoing.

d. ***Contribution Does Not Obstruct Settlements, But Rather Reduces The Risk Of Collusive Settlements Between Plaintiffs And Primary Wrongdoers.***

NASCAT's assertion (Br. 18-22) that contribution rights obstruct settlement is belied by experience. Contribution under the securities laws is available (and has been for some time) in almost every jurisdiction in the

country. Yet, studies show that "virtually all securities-fraud class-action cases are resolved through settlement." F. Dunbar, National Economic Research Associates, Inc., *Recent Trends in Securities Class Action Suits*, Table 1 (Aug. 1992) (of 356 class-action suits studied, 336 were settled, 14 were dismissed, and 6 went to judgment). See also O'Brien, *The Class-Action Shakedown Racket*, Wall St. J., Sept. 10, 1991, at A20 (finding 96% settlement rate in securities class-action suits); Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 525 (1991) ("all evidence indicates that the settlement rate for securities class actions is much higher than for civil litigation generally"); *ibid.* (less than 5% of securities actions in 1987 went to trial); Kennedy, *Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study*, 14 Houston L. Rev. 769, 811 (1977) (6% of cases studied were tried, 83% settled, and 11% dismissed without any settlement). Contribution plainly is not obstructing settlement of Section 10(b) claims.

Moreover, as this Court observed in *Northwest Airlines*, 451 U.S. at 86-87 & n.16, contribution has become virtually the universal rule in this country. See also *Restatement (Second) of Torts* § 886A (1979) (endorsing contribution); 3 F. Harper, F. James & O. Gray, *The Law of Torts* § 10.2, at 40-42 (2d ed. 1986). Neither petitioners nor NASCAT have shown that the widespread adoption of the contribution principle has prevented settlement. Cf. *Reliable Transfer Co.*, 421 U.S. at 408 (in rejecting the argument that a rule requiring the allocation of damages according to defendants' comparative fault would discourage settlements, the Court observed that "[e]xperience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements").

Furthermore, even in theoretical terms, contribution would discourage settlement only if defendants who went to trial and were found liable were then permitted to seek contribution from defendants who had settled. If non-settling defendants were barred from recovering contribution from settling defendants, however, the incentive to settle would be the same as under a no-contribution rule. See Adamski, *supra*, at 542; *Donovan* v. *Robbins*, 752 F.2d 1170, 1180-1181 (7th Cir. 1985) (Posner, J.). Thus, the approach adopted by the Ninth Circuit and other courts—whereby non-settling defendants are barred from recovering contribution from settling defendants, but the total judgment against the non-settling defendants is reduced by the settling defendants' share of liability—preserves the fairness and deterrence functions of contribution without discouraging settlements. *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989), cert. denied, 111 S. Ct. 232 (1990). Accord *United States Fidelity & Guar. Co.* v. *Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1572-1577 (D.S.C. 1991); *In re Sunrise Sec. Litig.*, 698 F. Supp. 1256 (E.D. Pa. 1988). See also Uniform Comparative Fault Act § 6 (1977) (adopting identical rule for common law tort actions); *Donovan*, 752 F.2d at 1180-1181 (ERISA); *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1248 (5th Cir. 1979) (admiralty); *Gomes* v. *Brodhurst*, 394 F.2d 465, 468-469 (3d Cir. 1967) (tort).

A no-contribution rule, on the other hand, would encourage an unfair "rush to settlement" in which some parties (frequently the most culpable ones) would be able to "extricate themselves from the litigation in exchange for relatively small settlement amounts, leaving the non-settling defendants to bear a much larger liability in the form of the final court judgment." *Huddleston*, 640 F.2d at 558. Not only are such partial settlements unfair to the non-settling defendants—who are isolated solely because of their "deep pockets," without regard to their

relative culpability—but they do not even terminate the litigation, as the suit against the non-settling defendants continues. See *ibid.*[13]

e. *Contribution Has Not Created An Unmanageable Administrative Burden.*

Finally, petitioners and NASCAT argue that the Court should eliminate contribution in Section 10(b) actions in order to avoid the need to resolve ancillary issues—such as what method of damages allocation to use—and to relieve courts of the additional proceedings that contribution entails. Pet. Br. 38-40; NASCAT Br. 22-24. But courts already must resolve the additional issues raised by a contribution rule in cases brought under the securities law provisions that expressly provide for contribution. See, *e.g.*, *Kaypro Corp.*, 884 F.2d 1222 (Section 11). And this Court has recognized contribution rights in admiralty cases (see *Cooper Stevedoring Co.*, 417 U.S. at 111, and *Reliable Transfer Co.*, 421 U.S. at 397); and almost every state provides for contribution in some form (see page 27, *supra*). The task of establishing the relatively few standards needed to guide the contribution inquiry has not proved overwhelming in any of these settings.

In addition, there is no indication that contribution rights have impeded the prosecution of meritorious claims or overburdened courts in cases under the provisions of the securities laws that provide for contribution or in admiralty or state court cases. Petitioners' unsupported assertions provide no basis for rejecting what has, without any apparent adverse effect on the system, become the norm in most litigation in this country.

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[13] Even if defendants' willingness to settle might be affected, that would not provide grounds for eliminating contribution. "Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." *Reliable Transfer Co.*, 421 U.S. at 408.

More fundamentally, the no-contribution rule's supposed ease of application fails to justify its extreme unfairness and the deleterious consequences such a rule would have on securities litigation. Cf. *Reliable Transfer Co.*, 421 U.S. at 407-408 (adopting comparative-fault rule in admiralty cases despite "[p]otential problems of proof" and resulting increase in litigation because alternative rule "produce[d] unjust results"). Any administrative efficiency resulting from a no-contribution rule would likely be outweighed by an increase in meritless strike suits against "deep pocket" defendants. See pages 23-24, *supra*. In sum, the relevant policy considerations weigh decidedly in favor of allowing contribution.

B. This Court Has The Power To Leave In Place The Longstanding Practice Of Allowing Contribution Among Defendants In Section 10(b) Actions.

Petitioners contend that the analysis set forth above is not dispositive in this case. They assert that the Court must bar contribution claims even in the face of compelling evidence that Congress would have provided for contribution had it known that there would be a private damages action implied under Section 10(b). The only permissible course, they assert, is for the Court to reject over two decades of precedent under which contribution has been a settled element of the Section 10(b) action, and reconfigure the Section 10(b) remedy so that it bears no resemblance to what Congress would have done and, indeed, frustrates Congress's express determination that contribution should be available with respect to claims similar to those that may be asserted under Section 10(b). Nothing in this Court's jurisprudence requires that absurd result.

1. *There Is No Basis For Distinguishing The Decision Whether Defendants May Allocate Damages Through Contribution From The Numerous Determinations Previously Made By This Court Regarding The Contours Of The Section 10(b) Remedy.*

Petitioners recognize that this Court has made a number of determinations regarding the Section 10(b) action, including fixing the statute of limitations; delineating the class of persons entitled to assert a claim for damages; and establishing the measure of damages. See *Lampf, supra; Blue Chip Stamps, supra; Randall* v. *Loftsgaarden*, 478 U.S. 647, 663 (1986). Petitioners concede the Court's authority to make those determinations because they constitute part of the "inevitable task of fleshing out the contours of the [Section 10(b)] claim." Br. 16. But petitioners assert that this case is different because it involves "neither an elaboration nor even an extension of a private right implied for an investor who has suffered loss as a result of violation of § 10(b)." *Id.* at 17. In petitioners' view, the Court lacks the power to permit contribution unless the contribution right can be justified independently under the analysis that the Court uses in deciding whether to recognize entirely new causes of action.

This Court has never endorsed the distinction drawn by petitioners. In *Northwest Airlines* and *Texas Industries* the Court did characterize a contribution claim as a "right of action." *Northwest Airlines*, 451 U.S. at 91; *Texas Indus.*, 451 U.S. at 638. But the Court had no occasion to—and did not—distinguish contribution from other issues relating to the parameters of a particular remedy. It simply invoked the congressional intent test that applies in determining all questions relating to express causes of action and held that contribution is permissible, in the context of an express action, only where

Congress has affirmatively manifested its intent to authorize it. [14]

In fact, although the contribution right may as a technical matter involve a cause of action different from the plaintiff's claim, contribution is in no sense an entirely separate action. Rather, contribution is so intimately bound up with the remedy invoked by the plaintiff that it simply makes no sense to treat the contribution issue differently from other questions regarding the scope of the remedy. The recognition of a cause of action should carry with it the power to address all subsidiary questions necessary to make that cause of action complete. Cf. *Virginia Bankshares*, 111 S. Ct. at 2764 (contours of cause of action developed without reference to congressional intent "need not be frozen" but rather may be "round[ed] out" to avoid inequity). The existence of a contribution right plainly constitutes one of those subsidiary questions.

First, a contribution claim is not at all independent of the plaintiff's action under Section 10(b); rather, it is entirely dependent upon and subsidiary to the plaintiff's action. The essence of the contribution claim is that the defendant in contribution is jointly liable to the plaintiff for the injury that is the basis of the plaintiff's suit. See page 5, *supra*. To the extent the plaintiff's claim fails, the contribution claim will necessarily expire. And in order to prevail in contribution, a party must prove that the defendant in contribution violated Section 10(b) and caused the very injury sued upon by the plaintiff. The contribution claim is thus entirely derivative of the plaintiff's Section 10(b) claim.

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[14] As we have discussed (see pages 10-11, note 2, *supra*), the Court in both cases expressly left open the question whether the same analysis would apply in determining the availability of contribution in Section 10(b) actions.

Second, the function of contribution is simply to allocate the damages due to the plaintiff among the potentially culpable parties. Determining the availability of contribution thus fixes part of the "contour" of the Section 10(b) claim in the same way as resolving questions regarding the measure of damages, the requisites of a plaintiff's standing to recover damages, and the statute of limitations. Indeed, as petitioners themselves acknowledge (Br. 37-40), the policy considerations relevant in determining whether contribution is appropriate relate entirely to the purposes of the overall Section 10(b) remedy. Contribution simply has no existence apart from the remedy to which it applies.

Third, petitioners are quite wrong in distinguishing (Br. 11) the contribution inquiry on the ground that contribution claims enhance the reach of the federal courts. Contribution by its nature cannot expand the class of potentially liable parties because any party joined as a defendant in contribution could have been named as a defendant by the plaintiff, and that party's liability will be determined according to precisely the same substantive standards. Indeed, in many—probably most—situations, contribution claims are not even asserted separately, but rather are part of the same formal action as the plaintiff's Section 10(b) claim.[15]

In sum, there is no basis for petitioners' distinction between the contribution question and the other issues regarding the parameters of the Section 10(b) remedy that have been resolved by this Court. All are subsidiary issues that must be addressed in order to create a complete remedy. And, because Congress plainly would have provided for contribution if it had known a private right of action would be implied under Section 10(b), the

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[15] Federal Rules of Civil Procedure 13 and 14 authorize the assertion of contribution claims as part of the initial action.

Court can and should allow contribution to continue to be available to defendants in these actions.[16]

2. *Even If The Contribution Issue Were Analyzed As Though The Question Were Whether The Court Should Recognize A Wholly New And Independent Cause Of Action, The Court Has The Power To Permit Contribution In Section 10(b) Cases.*

If the Court were to determine, contrary to our submission, that the contribution question must be resolved according to the principles the Court uses to decide whether to recognize a wholly independent cause of action, the appropriate outcome in this case would not change. The contribution right may be justified on three separate rationales.

a. *Longstanding Judicial Acceptance.* This Court repeatedly has stated that its recognition of the Section 10(b) action rests not on a finding that Congress intended to create a cause of action, but rather on "acquiesce[nce]

[16] Petitioners suggest (Br. 11) that permitting contribution would "implicate[] separation-of-powers concerns" because it would extend the power of the federal courts. But, as discussed above, contribution would not expand the class of persons who could be brought before the federal courts as defendants. Petitioners' citation of *Franklin* v. *Gwinnett County Public Schools*, *supra*, is inapposite both for that reason and because the Court there indicated that any separation-of-powers concerns would result from the intrusion of the federal courts into the authority of the Legislative and Executive Branches. Here, the Court has already intruded into that sphere by creating the Section 10(b) remedy in the first place. Failure to recognize a contribution right would *increase* the intrusion by configuring the Section 10(b) remedy in a way that would further disrupt Congress's plan, as a practical matter nullifying Congress's decision to authorize contribution in the express causes of action. Finally, this Court has expressly rejected the contention "that the judicial recognition of an implied private remedy violates the separation-of-powers doctrine." *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 375-376 (1982). That conclusion is especially appropriate with respect to the contribution question before the Court in this case.

in the 25-year-old acceptance by the lower federal courts of an implied action under § 10(b)." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 577-578 n.19 (1979). See also *Cannon* v. *University of Chicago*, 441 U.S. 677, 692 n.13 (1979). The Court considered whether the same rationale could be used to imply a private action under Section 17(a) of the Securities Exchange Act, 15 U.S.C. § 78q(a), but held that it could not because there was "no similar history of longstanding lower-court interpretation"; the Court observed that a private action had been recognized in only two cases in 45 years. *Touche Ross & Co.*, 442 U.S. at 577-578 n.19.

The right to contribution in Section 10(b) actions plainly has a history of "longstanding lower-court interpretation" sufficient to trigger this principle. The right was first recognized in a reported decision in 1968 (see *deHaas* v. *Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968), modified on other grounds, 435 F.2d 1223 (10th Cir. 1970)), consistently held to be available in numerous decisions from that time until 1988, and repeatedly reaffirmed by most courts since then.[17] Every

[17] See, *e.g.*, *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991); *Smith* v. *Mulvaney*, 827 F.2d 558, 560 (9th Cir. 1987); *Sirota* v. *Solitron Devices, Inc.*, 673 F.2d 566, 578 (2d Cir.), cert. denied, 459 U.S. 838 (1982); *Tucker* v. *Arthur Andersen & Co.*, 646 F.2d 721, 727 n.7 (2d Cir. 1981); *Stowell* v. *Ted S. Finkel Inv. Servs., Inc.*, 641 F.2d 323, 325 (5th Cir. 1981); *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 557-559 (5th Cir. 1981), aff'd in part, rev'd in part on other grounds, 459 U.S. 375 (1983); *Madigan, Inc.* v. *Goodman*, 498 F.2d 233, 238 (7th Cir. 1974); *In re Crazy Eddie Sec. Litig.*, 1992 U.S. Dist. LEXIS 13736, at *22-*24 (E.D.N.Y. Sept. 4, 1992); *Andrews* v. *Fitzgerald*, 1992 U.S. Dist. LEXIS 9315, at *7 (M.D.N.C. Feb. 7, 1992); *In re Granada Partnership Sec. Litig.*, 1992 U.S. Dist. LEXIS 14194, at *7-*8 (S.D. Tex. April 27, 1992); *McCoy* v. *Goldberg*, 778 F. Supp. 201, 203 (S.D.N.Y. 1991); *United States Fidelity & Guar. Co.* v. *Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1569 (D.S.C. 1991); *MFS Municipal Income Trust* v. *American Medical Int'l*, 751 F. Supp. 279, 281 (D. Mass. 1990); *Baker* v. *B.P. Am., Inc.*, 749 F. Supp. 840, 842-844 (N.D. Ohio 1990); *Leavenworth Nat'l Bank & Trust*

court of appeals to address the question has ruled in favor of contribution, with the single exception of the

Co. v. *Merrill Lynch, Pierce, Fenner & Smith*, 1990 U.S. Dist. LEXIS 13163, at *5-*6 & n.5 (W.D. Mo. Sept. 26, 1990); *Fields* v. *Oliver's Stores, Inc.*, 1990 U.S. Dist. LEXIS 8155, at *2-*3 (S.D.N.Y. July 3, 1990); *In re Terra-Drill Partnerships Sec. Litig.*, 726 F. Supp. 655, 656 (S.D. Tex. 1989); *Alvarado Partners, L.P.* v. *Mehta*, 723 F. Supp. 540, 550 (D. Colo. 1989); *In re Atlantic Fin. Management, Inc. Sec. Litig.*, 718 F. Supp. 1012, 1016 (D. Mass. 1988); *Eastern Holdings, Inc.* v. *Illinois Co. Invs., Inc.*, 1989 U.S. Dist. LEXIS 8515, at *8-*9 (N.D. Ill. July 17, 1989); *In re National Smelting of New Jersey, Inc. Bondholders' Litig.*, 722 F. Supp. 152, 171, 176 (D.N.J. 1989); *Wilder* v. *Williams*, 1989 U.S. Dist. LEXIS 14044, at *12-*13 (W.D. Pa. June 7, 1989); *In re Wedtech Corp.*, 87 Bankr. 279, 288 (S.D.N.Y. 1988); *Robin* v. *Doctors Officenters Corp.*, 686 F. Supp. 199, 202 (N.D. Ill. 1988), aff'd, 915 F.2d 1120 (7th Cir. 1990); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 1988 U.S. Dist. LEXIS 16532, at *13 (W.D. Wash. July 28, 1988); *In re National Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig.*, 682 F. Supp. 1073, 1082 (C.D. Cal. 1987); *Riordan* v. *Smith Barney*, 1987 U.S. Dist. LEXIS 4827, at *2-*3 (June 8, 1987); *In re Olympia Brewing Co. Sec. Litig.*, 674 F. Supp. 597, 616 (N.D. Ill. 1987); *In re Towner Petroleum Co. Sec. Litig.*, 1987 U.S. Dist. LEXIS 1113 (E.D. Pa. Feb. 12, 1987); *Nelson* v. *Bennett*, 662 F. Supp. 1324, 1328 & n.6 (E.D. Cal. 1987); *Pepsico, Inc.* v. *Continental Cas. Co.*, 640 F. Supp. 656, 662 (S.D.N.Y. 1986); *Eacho* v. *N D Resources, Inc.*, No. 83-2903, Fed. Sec. L. Rep. (CCH) ¶ 92,067 (D.D.C. May 23, 1985); *Harrison* v. *Sheats*, 608 F. Supp. 502, 506 (E.D. Cal. 1985); *Tri-State Bank of East Dubuque* v. *Dain Bosworth Inc.*, No. CV 81-0-109, Fed. Sec. L. Rep. (CCH) ¶ 92,751 (D. Neb. Mar. 26, 1985); *Seiler* v. *E.F. Hutton & Co.*, 102 F.R.D. 880, 885-886 (D.N.J. 1984); *Phillips* v. *Merrill Lynch, Pierce, Fenner & Smith*, Civ. No. 4-81-394, Fed. Sec. L. Rep. (CCH) ¶ 91,649 (D. Minn. July 27, 1984); *Quintel Corp., N.V.* v. *Citibank, N.A.*, No. 80 Civ. 4936, slip op. (S.D.N.Y. Dec. 23, 1983); *Kennedy* v. *Josephthal & Co.*, Civ. No. 82-913-MA, Fed. Sec. L. Rep. (CCH) ¶ 99,204 (May 9, 1983); *Noonan* v. *Granville-Smith*, 532 F. Supp. 1007, 1008 (S.D.N.Y. 1982); *Maryville Academy* v. *Loeb Rhoades & Co.*, 530 F. Supp. 1061, 1073 (N.D. Ill. 1981); *In re National Student Mktg. Litig.*, 517 F. Supp. 1345, 1346-1349 (D.D.C. 1981); *Seymour* v. *Bache & Co.*, 502 F. Supp. 115, 119 (S.D.N.Y. 1980); *Nelson* v. *Quimby Island Reclamation Dist. Facilities Corp.*, 491 F. Supp. 1364, 1383 (N.D. Cal. 1980); *Marrero* v. *Abraham*, 473 F. Supp.

Eighth Circuit's contrary decision earlier this year. See *Chutich* v. *Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992).[18] That ruling rested on the erroneous theory ad-

1271, 1276-1278 (E.D. La. 1979); *Stratton Group, Ltd.* v. *Sprayregen*, 466 F. Supp. 1180, 1185 (S.D.N.Y. 1979); *McLean* v. *Alexander*, 449 F. Supp. 1251, 1266-1267 (D. Del. 1978), rev'd on other grounds, 599 F.2d 1190 (3d Cir. 1979); *Rice* v. *McDonnell & Co.*, 442 F. Supp. 952, 954 (S.D.N.Y. 1977); *Odette* v. *Shearson, Hammill & Co.*, 394 F. Supp. 946, 958 (S.D.N.Y. 1975); *B & B Inv. Club* v. *Kleinert's, Inc.*, 391 F. Supp. 720, 724 (E.D. Pa. 1975); *State Mutual Life Assurance Co.* v. *Arthur Andersen & Co.*, 63 F.R.D. 389, 393 (S.D.N.Y. 1974); *Alexander & Baldwin, Inc.* v. *Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974); *Liggett & Myers Inc.* v. *Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974); *Getter* v. *R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973); *Sherlee Land* v. *Commonwealth United Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 93,749 (Jan. 16, 1973); *Altman* v. *Liberty Equities Corp.*, 54 F.R.D. 620, 623 (S.D.N.Y. 1972); *Globus, Inc.* v. *Law Research Serv.*, 318 F. Supp. 955, 957-958 (S.D.N.Y. 1970), aff'd, 442 F.2d 1346 (2d Cir.), cert. denied, 404 U.S. 941 (1971). Cf. *Gould* v. *American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 168-169 (D. Del. 1974), vacated on other grounds, 535 F.2d 761 (3d Cir. 1976) (right of contribution under Section 14(a) of Securities Exchange Act). Some courts have recognized the right of contribution, but have held contribution unavailable on the facts of the particular case. See, *e.g.*, *Heizer Corp.* v. *Ross*, 601 F.2d 330, 331-334 (7th Cir. 1979); *In re Drexel Burnham Lambert Group Inc.*, 1992 Bankr. LEXIS 1653, at *2 (S.D.N.Y. Oct. 13, 1992); *Department of Econ. Dev.* v. *Arthur Andersen & Co.*, 747 F. Supp. 922, 932 (S.D.N.Y. 1990); *In re Crazy Eddie Sec. Litig.*, 740 F. Supp. 149, 152 (E.D.N.Y. 1990); *Connecticut Nat'l Bank* v. *Reliance Ins. Co.*, 704 F. Supp. 506, 509 (S.D.N.Y. 1989); *In re Citisource Inc. Sec. Litig.*, 694 F. Supp. 1069, 1082 (S.D.N.Y. 1988); *Alexander Grant & Co.* v. *McAlister*, 669 F. Supp. 163, 165-166 (S.D. Ohio 1987); *Kilmartin* v. *H.C. Wainwright & Co.*, 637 F. Supp. 938, 940-942 (D. Mass. 1986); *Aul* v. *Coli*, No. 84 C 7884, slip op. (N.D. Ill. Sept. 23, 1986); *Ahern* v. *Gaussoin*, 104 F.R.D. 37, 40 (D. Or. 1984); *Schnell* v. *Steans*, No. 80 Civ. 2442, Fed. Sec. L. Rep. (CCH) ¶ 98,678 (May 17, 1982).

[18] Petitioners point (Br. 32) to *King* v. *Gibbs*, 876 F.2d 1275 (7th Cir. 1989), as concluding, in dictum, that there is no right of contribution under Section 10(b). But *King* addressed only the

vanced by petitioners here—the application of this Court's decisions in *Northwest Airlines* and *Texas Industries* to the action implied under Section 10(b).[19]

In these circumstances, the Court should uphold the contribution right on the same basis as it has upheld the Section 10(b) action itself—the longstanding acceptance of contribution by the lower courts.

b. *Congressional Ratification.* This Court also has grounded approval of a cause of action in congressional

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question of indemnification in Section 10(b) actions, holding that it was not available because there was no evidence that Congress intended to authorize indemnification. Indemnification stands on an entirely different footing from contribution, however, because none of the express causes of action in the securities laws authorizes indemnification. Accordingly, the congressional intent argument set forth above could not have been made in that case. Thus, although the court of appeals did criticize the rationale of its earlier decision recognizing contribution, the decision in *King* cannot be taken as any indication that the court of appeals would overrule that prior decision, in the face of the strong evidence of congressional intent to authorize contribution.

The other court of appeals decision cited by petitioners—*Baker, Watts & Co.* v. *Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (en banc)—involves the availability of contribution and indemnification under an express cause of action (Section 12(2) of the Securities Act, 15 U.S.C. § 77*l*(2)). That case, like this Court's decisions in *Texas Industries* and *Northwest Airlines*, does not control the question whether contribution is permissible under the private action implied under Section 10(b).

[19] Significantly, 11 years passed between this Court's decisions and their application by a court of appeals to contribution under Section 10(b). Moreover, most courts that have considered the question have specifically rejected the argument that this Court's decisions in *Northwest Airlines* and *Texas Industries* preclude finding a right to contribution under Section 10(b). See, *e.g.*, *In re Crazy Eddie Sec. Litig.*, *supra*; *Baker* v. *B.P. Am., Inc.*, *supra*; *Fields* v. *Oliver's Stores, Inc.*, *supra*; *Wilder* v. *Williams*, *supra*; *Riordan* v. *Smith Barney*, *supra*; *In re Towner Petroleum Co. Sec. Litig.*, *supra*; *Seiler* v. *E.F. Hutton & Co., Inc.*, *supra*; *Noonan* v. *Granville-Smith*, *supra*; *In re National Student Mktg. Litig.*, *supra*.

ratification of judicial decisions establishing the cause of action. Where Congress legislates in the face of a clear judicial recognition of the cause of action—and Congress leaves the cause of action intact—the Court will in some circumstances find that Congress has authorized the cause of action. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-382 (1982).

Indeed, the Court has applied this precise rationale to the Section 10(b) action. In *Herman & MacLean* v. *Huddleston*, 459 U.S. 375 (1983), the question was whether a Section 10(b) action is available in circumstances in which the plaintiff could invoke one of the express remedies set forth in the federal securities laws. In holding that a Section 10(b) cause of action could be asserted, the Court observed that "when Congress comprehensively revised the securities laws in 1975, a consistent line of judicial decisions had permitted plaintiffs to sue under § 10(b) regardless of the availability of express remedies." 459 U.S. at 384. "In light of this well-established judicial interpretation," the Court stated, "Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action." *Id.* at 385-386.

The same conclusion applies with respect to contribution. "When Congress acted [in 1975], federal courts had consistently and routinely" (*Huddleston*, 459 U.S. at 385) held that contribution was available in Section 10(b) actions. See pages 35-37 and note 17, *supra*. And Congress even more recently revisited the securities laws —and Section 10(b) actions in particular—when it enacted a statute in 1991 eliminating the retroactive effect of this Court's decision in *Lampf*. See 15 U.S.C. § 78aa-1. Congress's failure to change the well-settled rule regarding contribution suggests that Congress ratified that rule. The contribution right can be upheld on that ground alone.

c. *Federal Common Law.* A third basis for recognizing the right to contribution is federal common law. In *Texas Industries* and *Northwest Airlines* the Court held that a contribution right could not be based on federal common law where Congress expressly provided for a private right of action but not for contribution. Those holdings rested on two conclusions: first, that the question regarding the existence of contribution in those cases did not involve "issues of uniquely federal concern," *Northwest Airlines*, 451 U.S. at 95; *Texas Indus.*, 451 U.S. at 641-642; and second, that the Court could not "provide a new remedy which Congress has decided not to adopt," *Northwest Airlines*, 451 U.S. at 97. The Court observed that "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. * * * The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." *Ibid.* (footnote omitted); *Texas Indus.*, 451 U.S. at 641-642, 645. Neither of these conclusions applies in the context of the judicially created Section 10(b) remedy.

To begin with, there is no danger that preserving the contribution right will upset a carefully crafted legislative scheme. Congress did not craft the Section 10(b) remedy. The presumption underlying *Northwest Airlines* and *Texas Industries*—that contribution was deliberately omitted from the statute—is for that reason wholly inapplicable here. Indeed, as we have discussed (at 20), it is *prohibiting* contribution that would upset Congress's design.

Moreover, in the peculiar circumstances of Section 10(b), there is a "uniquely federal concern" in permitting contribution. Because the remedy is entirely a creature of the federal judiciary, the Court should have

the power to make it complete. Just as the Court's common law authority over admiralty is not constrained (except when Congress acts), so too here, the Court should be able to take all steps necessary to create a properly functioning remedy. There is a "uniquely federal concern" in preventing gaps in a court-created remedy that could cause the remedy to function in a way that would not fulfill the purposes that led to its creation. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (observing that the Court's previous decisions had addressed "various positive and common-law requirements for a violation of § 10(b) or of Rule 10b-5").

In addition, failure to permit contribution would effectively negate the decision of the Legislative and Executive Branches—reflected in express causes of action set forth in the securities laws—to permit contribution in securities fraud actions. That would adversely effect the relationship between the branches of government, allowing the Court to trump a policy determination made by the political branches. Preserving the proper separation of functions is indisputably a matter of "uniquely federal concern." See *Texas Indus.*, 451 U.S. at 642 (referring to questions involving "the distribution of powers in our federal system" as a proper subject for the exercise of federal common law power).

Exercising the Court's federal common law authority on this basis would not create a broad precedent; the rationale is exceedingly narrow. It would apply only where the Court has created a cause of action but some perceived limitation on the Court's authority prevents it from configuring the remedy so as to conform to the surrounding congressional plan. Especially in view of the longstanding recognition of contribution, determining that contribution may no longer be a part of the Section 10(b) remedy "would be highly unjust to those who must litigate past inventions." *Lampf*, 111 S. Ct. at 2783 (Scalia, J., concurring). Federal common law should be available to

prevent that result by filling any gap in the Court's authority to permit contribution.[20]

3. *Adoption Of Petitioners' Contention That The Court Lacks The Power To Permit Contribution Would Cast Doubt On The Continued Viability Of The Section 10(b) Action.*

If the Court were to reject our submission and conclude that it lacks the power to permit contribution, its decision would necessarily call into question the vitality of the entire Section 10(b) remedy. After all, the Court's recognition of the Section 10(b) remedy rests upon the very factors just discussed—the longstanding existence of the cause of action and congressional ratification. To the extent those factors are now, under the Court's jurisprudence, an insufficient basis on which to recognize the contribution right, they would by definition no longer be sufficient to support the Section 10(b) remedy. Logic would dictate that the Court lacked the requisite judicial power when it recognized an implied cause of action under Section 10(b).

Such a decision would work a tremendous upheaval in the law, requiring either abandonment of a private right of action under Section 10(b) itself or tolerance of theoretical inconsistency of such proportions as to bring into question issues of fundamental fairness. The Court that has the power to imply a claim under Section 10(b) has the power to recognize contribution under that same section. *Leavenworth Nat'l Bank & Trust Co.* v. *Merrill Lynch, Pierce, Fenner & Smith*, 1990 U.S. Dist. LEXIS

[20] Petitioners may assert that there is no need for the Court to act because Congress can authorize contribution if it deems that step appropriate. But that contention proves too much because Congress can act with respect to any matter that may be the subject of a federal common law rule. That has not previously prevented the Court from invoking federal common law in situations that it deems appropriate. For the reasons discussed in text, the Court should follow the same course here.

13163, at *6 n.5 (W.D. Mo. Sept. 26, 1990) ("[i]t simply makes no sense and is grossly unfair to subject some defendants to liability under [an implied cause of action] of the securities laws and then, merely because the Supreme Court reversed course in the recognition of implicit causes of action, to leave those same defendants exposed to an unfair rule of no contribution. Either the 10b-5 action should be abolished or * * * a fair catalog of remedies should be available").

Adoption of petitioners' approach would in addition create considerable uncertainty regarding the scope of the courts' authority to superintend causes of action. For example, even if the Section 10(b) remedy were upheld, could the Court permit claims seeking to impose secondary liability on an aiding and abetting theory? Such a legal theory would broaden the class of persons who could be sued for damages under Section 10(b) and thereby arguably effect an expansion of the authority of the federal courts. It would therefore be quite problematic under petitioners' theory. There simply is no reason for the Court to create the confusion and uncertainty that would result from adoption of petitioners' approach.

C. Responsibility Under Section 10(b) Should Be Allocated Among Jointly Liable Defendants On The Basis Of Relative Fault.

Amicus NASCAT suggests (Br. 27-29) that if the Court concludes that contribution is permitted under Section 10(b), the Court should go on to determine the standard for allocating damages among jointly liable defendants. It is not clear to us that this case presents an occasion for the Court to address the issue, but we respond to NASCAT's arguments in the event the Court deems it appropriate to do so.

Questions regarding contribution arise in two general situations. The first is where the plaintiff's claim has been completely extinguished—whether through judgment

or settlement or otherwise [21]—and one defendant, or group of defendants, asserts that it has paid more than its share and seeks contribution from other jointly liable parties. The question there is how the shares shall be allocated among parties. That is the posture of this case.

NASCAT spends most of its time discussing the second situation: where the plaintiff has settled with some but not all jointly liable parties and, as part of the settlement, the court enters an order barring contribution claims against the settling defendants. The question there is how any subsequent judgment against the non-settling parties should be altered to take account of the settlement previously obtained by the plaintiff. We discuss the two situations separately.

1. *When The Plaintiff's Claim Has Been Extinguished, Responsibility For Paying The Settlement Or Judgment Should Turn On Relative Fault.*

There are two basic methods for apportioning responsibility for paying a settlement or judgment when the plaintiff can no longer proceed against any responsible party: the "equal shares" or "*pro-rata*" method, under which all responsible parties must shoulder equal shares of the payment to the plaintiff; and the "relative fault" or "comparative fault" method, under which the shares of the responsible parties are based upon their relative fault, as determined by the finder of fact. See 3 F. Harper, F. James & O. Gray, *The Law of Torts* § 10.2, at 51-53.

The contribution provisions in the express causes of action contained in the securities laws do not specifically indicate which method of apportionment should be used. Rather, those provisions simply state that contribution shall be available "as in cases of contract." 15 U.S.C. §§ 77k(f), 78i(e) & 78r(b).

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[21] Here, for example, the plaintiffs settled with some defendants and the statute of limitations ran on their claim against the attorneys and accountants not joined in the original action.

Although the meaning of that phrase is somewhat obscure, a number of courts and commentators have concluded that it simply expresses Congress's intent to depart from the then-traditional no-contribution rule of the common law of torts, and was not intended as a wholesale adoption of the contribution regime used in contract cases. See, *e.g.*, *Kaypro Corp.*, 884 F.2d at 1227-1228; *Smith* v. *Mulvaney*, 827 F.2d 558, 560-561 (9th Cir. 1987); *McLean* v. *Alexander*, 449 F. Supp. 1251, 1275 n.81 (D. Del. 1978), rev'd on other grounds, 599 F.2d 1190 (3d Cir. 1979); *Gould* v. *American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 170 (D. Del. 1974), vacated on other grounds, 535 F.2d 761 (2d Cir. 1976); Adamski, *supra*, at 557; Fischer, *Contribution in 10b-5 Actions*, 33 Bus. Law. 1821, 1829-1830 (1978).[22]

Courts in securities cases have for the most part apportioned liability by reference to relative fault. See, *e.g.*, *Kaypro Corp.*, 884 F.2d at 1226, 1230-31 (Section 11); *Mulvaney*, 827 F.2d at 561 (Section 10(b)); *United States*

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[22] Moreover, courts have noted that even in contract cases, *pro-rata* contribution was not the uniform rule at the time the securities laws were enacted. See *Gould*, 387 F. Supp. at 170; Fischer, *supra*, at 1830. Rather, it appears that courts started with a presumption of *pro-rata* contribution because co-obligors were presumed to benefit equally from a contract. But where evidence was introduced showing unequal benefit, courts often would allocate contribution according to the benefit each obligor received. See, *e.g.*, *Livingston* v. *Falk*, 217 N.Y.S. 131 (N.Y. App. Div. 1926); *Key* v. *Oates*, 280 S.W. 286, 288 (Tex. Civ. App. 1926), writ ref'd; 18 Am. Jur. 2d *Contribution* §§ 22-23 (1964); 18 C.J.S. *Contribution* § 8 (1990); Williston, *The Law of Contracts* § 345, at 1019 (2d ed. 1936) ("it will be inferred that the[] shares [of liability of co-obligors] are in proportion to their interest in the matter"); *Restatement of Restitution* § 85, cmt. f (1935) (where persons are engaged in a common enterprise, their liability for contribution to each other is unequal if their interests in the enterprise are unequal). See also *Kahn* v. *Weldin*, 653 P.2d 1268, 1274 (Or. Ct. App. 1982), petition denied, 662 P.2d 726 (Or. 1983); *Manning* v. *Campbell*, 204 N.Y.S.2d 718, 741 (N.Y. Sup. Ct. 1960).

Fidelity & Guar. Co., 772 F. Supp. at 1572-1577 (Section 10(b)); *Alvarado Partners, L.P.* v. *Mehta*, 723 F. Supp. 540, 550-553 (D. Colo. 1989) (Section 11 and Section 10(b)), appeal dismissed, 936 F.2d 582, 583 (10th Cir. 1991); *In re Sunrise Sec. Litig.*, 698 F. Supp. 1256, 1258-1261 (E.D. Pa. 1988) (sections of Securities Exchange Act); *McLean*, 449 F. Supp. at 1272-1277 (Section 10(b)); *Gould*, 387 F. Supp. at 169-171 (Section 14(a)); *Pepsico, Inc.* v. *Continental Cas. Co.*, 640 F. Supp. 656, 662 (S.D.N.Y. 1986) (Section 10(b)).

That result accords with the "modern trend to provide for apportionment according to relative fault." 3 F. Harper, F. James & O. Gray, *The Law of Torts* § 10.2, at 51-52. And it is the approach adopted by this Court in the admiralty context. *Reliable Transfer Co.*, 421 U.S. at 407-408.

Apportionment according to relative fault is especially appropriate in Section 10(b) actions because, as we have discussed (at pages 22-26), the culpability of the various responsible parties may vary tremendously, from persons who designed and executed a fraudulent scheme for financial gain to those who simply failed to detect that scheme. Simple fairness, as well as principles of deterrence, require that persons in the former category bear the greatest proportion of the liability.

2. *Non-settling Defendants Are Entitled To A Credit Equal To The Share Of The Judgment That The Settling Defendant Would Have Borne If He Had Proceeded To Trial.*

When the plaintiff has settled with some defendants but retains a claim against others, the situation is somewhat more complex. The settling defendant in such a situation invariably seeks a "bar order" from the court prohibiting all parties from asserting contribution claims against him.[23] Courts have again followed two courses.

[23] Issuance of such an order is usually a condition for the consummation of the settlement.

Some have held that bar orders are permissible only if any subsequent judgment against the non-settling defendants is reduced by the amount that would have been allocated to the settling defendants on the basis of their share of liability. As we have discussed (at page 28), that approach was adopted by the Ninth Circuit in the *Kaypro* case. Other courts have utilized the *pro-tanto* approach, whereby the judgment against non-settling defendants is reduced by the amount of the settlement. NASCAT Br. 27-28.

The settlement bar question plainly is not at issue in this case; the plaintiffs' claims have been extinguished. There simply is no occasion for the Court to address that issue here.

In any event, the *Kaypro* rule is by far the superior one. Absent a bar order, the non-settling defendant would be entitled to contribution on the basis of the applicable allocation method (which, as discussed above, should be according to relative fault). Why should a settlement between the plaintiff and another defendant force the non-settling defendant to pay more than his fair share? There simply is no justification for permitting one defendant to foist his liability off on another responsible party and thereby override contribution rules that serve important public policies.

Indeed, the *pro-tanto* approach has many of the same flaws as the no-contribution rule and should be rejected under Section 10(b) for the same reasons. For instance, the *pro-tanto* approach could result in collusion between the plaintiff and settling defendants: the plaintiff might accept an inadequate sum in settlement so that, with the help of the settling defendants, he could obtain a judgment against a "deep-pocket" defendant. *Kaypro Corp.*, 884 F.2d at 1230; Adamski, *supra*, at 549; *In re Sunrise Sec. Litig.*, 698 F. Supp. at 1259. The result, as with the no-contribution rule, would be an increase in strike suits,

because the plaintiff could threaten to impose the bulk of the burden of payment on less culpable defendants simply because of their "deep pockets." *Kaypro Corp.*, 884 F.2d at 1230; Adamski, *supra*, at 551; *River Garden Farms, Inc.*, 103 Cal. Rptr. at 503.

Alternatively, to minimize the risk of such collusion under the *pro-tanto* method, courts would be required to inquire into the good faith of the parties and the fairness of the settlement amount to non-settling defendants, "bogging down the settlement process in a miniature trial before trial" and minimizing any administrative efficiency that would otherwise result from settlement. *Donovan*, 752 F.2d at 1181; *United States Fidelity & Guar. Co.*, 772 F. Supp. at 1574-1575; *Alvarado Partners*, 723 F. Supp. at 553; *In re Sunrise Sec. Litig.*, 698 F. Supp. at 1259. Adamski, *supra*, at 549-550. Moreover, even with a good faith inquiry, settling defendants would retain the ability to transfer to non-settling defendants any liability not covered by the settlement, thereby forcing the latter to bear a share of liability disproportionate to their culpability. *Kaypro Corp.*, 884 F.2d at 1230. See also Adamski, *supra*, at 550; *Alvarado Partners*, 723 F. Supp. at 553; *In re Sunrise Sec. Litig.*, 698 F. Supp. at 1259. For these reasons, the *Kaypro* rule, which has been applied in numerous areas of the law (see cases cited at page 28, *supra*) is clearly superior to the *pro-tanto* rule.[24]

[24] NASCAT argues (Br. 27-28) that the *Kaypro* approach means that plaintiffs may not gain a full recovery. But if that were to occur, it would be a consequence of a plaintiff's decision to allow a defendant to settle for an amount less than the jury's determination of that defendant's share of the liability.

CONCLUSION

The judgment of the court of appeals with respect to the question presented in the certiorari petition should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), provides:

> All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

2. Section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), provides in pertinent part:

> Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction[.]
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> • • •
>
> Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

3. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> • • •
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a

national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

4. Section 18 of the Securities Exchange Act of 1934, 15 U.S.C. 78r, provides in pertinent part:

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed [with the Commission] * * * which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. * * *

(b) Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

5. Rule 10b-5, 17 C.F.R. 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.